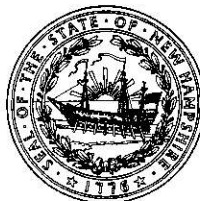# ATTORNEY GENERAL
DEPARTMENT OF JUSTICE

33 CAPITOL STREET
CONCORD, NEW HAMPSHIRE 03301-6397

PETER W. HEED
ATTORNEY GENERAL

KELLY A. AYOTTE
DEPUTY ATTORNEY GENERAL

April 20, 2004

Voters of the Hollis Brookline Cooperative School District
Hollis Brookline Cooperative School Board
Moderator, Hollis Brookline Cooperative School District

      Re: March 2004 Annual District Meeting Article 4, Bond Vote

Dear Voters and School Board Members:

The annual meeting of the Hollis Brookline Cooperative School District (the "District") was held on Wednesday and Thursday March 3rd and 4th, 2004. Article 4 on the warrant was a bond issue on renovations and an addition to the District's middle school. On Thursday, March 4, 2004, the District's Moderator declared that Article 4 had passed by a vote of 1503 "yes" to 724 "no". This result indicated that 2227 voters cast ballots on Article 4. Subsequently, this Office received complaints that the checklists from Hollis and Brookline indicated that fewer than 2227 voters were checked off as having voted. Based on the evidence, we have obtained, we conclude that the checklists used for this vote reflect that 2175 voters voted on Article 4. Therefore, a discrepancy of 52 votes exists between the announced results and the checklists.

The New Hampshire Supreme Court has established a legal standard for the facts and circumstances that must exist before a court can declare a meeting vote invalid. "To set aside an election, a party "must prove either fraud which leaves the intent of the voters in doubt or irregularities in the conduct of the election of such a nature as to affect the result." *Appeal of McDonough*, 149 N.H. 105,114 (2003) (citing *Appeal of Soucy*, 139 N.H. 110, 117 (1994)). "The object of the election laws is to secure the rights of duly qualified voters, and not to defeat them." *Id.* at 110 (quoting *Opinion of the Justices*, 116 N.H. 756, 759 (1976). "The [party challenging a vote] bears the burden of establishing that in all likelihood the asserted defects affected the outcome of the vote." *City of Keene v. Gerry's Cash Market, Inc.*, 113 N.H. 165, 167 (1973).

There have been no specific allegations of fraud made in any of the complaints received about the vote on Article 4, and no evidence of fraud has been found at this time.

The Attorney General's Office has the duty and authority to enforce the election laws. RSA 7:6-c. This Office does not have authority to declare an election or meeting vote invalid. If an investigation produces evidence that the outcome of an election or meeting should be invalidated, this Office would seek an order from a Superior Court invalidating the election or meeting vote. Our Office provides neutral and detached investigators and attorneys who gather the available facts and dispassionately apply them to the law. In making a determination, we apply the law as adopted by the Legislature and as interpreted by the New Hampshire Supreme Court.

The standard for setting aside a vote where irregularities exist seeks to balance the interests of voters who lawfully cast ballots in having their vote count by having their collective decision put into effect against the interests of all voters in having a voting process that ensures public confidence in accurate results.

The Supreme Court, over the course of more than 150 years, has decided challenges to election and meeting votes that have addressed each of the irregularities presented by the March 3rd and 4th vote on Article 4 by the District. In each case, where the evidence did not establish that it was more likely than not that the results were affected by the irregularities, the Court held the declared result of the election or meeting valid. In some of those cases, the Court recognized that there was evidence of uncertainty as to the accuracy of the announced results. The Court nonetheless has consistently ruled that when irregularities of the character that are at issue with the Hollis-Brookline Article 4 vote exist, invalidating the vote is justified only by evidence establishing that the irregularities affected the result.

We conclude that, based on the evidence currently available, the evidence would not support the finding that the irregularities affected the result. The available evidence does not explain why the ballot count is 52 votes greater than the number of people checked off on the checklists as having voted on Article 4. Even if it could be proven that all 52 votes were illegal votes or even if it could be proven that a counting error occurred and the 52 votes never existed, removing those votes would not affect the result of the vote. Therefore, in our view, the evidence does not pass the legal test established by the Supreme Court for a court to invalidate a vote.

In circumstances where a known discrepancy exists, the courts have subtracted the number of illegal votes or the number of votes that might be attributable to a counting or checklist marking error from the declared total. The District's Moderator declared that there were 1503 "yes" votes. In this case, we expect a court would deduct 52 votes from the declared total of 1503 "yes" votes, producing a result of 1451 "yes" votes. There would then be 1451 "yes" votes and 724 "no" votes, for a total of 2175 votes. Two-thirds of 2175 is 1450. Therefore, 1450 votes would be required for Article 4 to pass. Without any of the 52

votes, Article 4 received 1451 "yes" votes. Thus, even if evidence were found that proved that none of the 52 votes should be counted, Article 4 would still pass. One possible explanation for some or all of the discrepancy is that legal voters cast lawful votes but were not checked off on the checklist. If any of the 52 votes were lawful votes cast by a voter whose name was not checked off on the checklist, Article 4 would have passed by a wider margin. If any of the 52 votes were unlawful "no" votes, their removal would also increase the margin by which Article 4 passed.

Because we find no evidence of fraud and because the evidence of irregularities in the conduct of the election is not of such a nature as to affect the result, this Office will not bring a declaratory judgment action seeking to have the Superior Court order the vote invalid.

Many citizens from the Hollis-Brookline Cooperative School District have expressed their belief that a new vote should be taken when a vote is conducted in a manner that fails to preserve the public's confidence that the outcome is fair and accurate. We are respectful of that viewpoint. We have not found evidence that clearly establishes the cause or source of the discrepancy between the ballot count and the checklist count. We recognize that this uncertainty raises legitimate concerns regarding the accuracy of the outcome. We, however, conclude that the best available evidence is that at least two-thirds plus one of the voters who lawfully cast ballots favored adoption of Article 4. The law protects the right of those lawful voters to have their decision carried into effect, unless evidence exists that irregularities affected that outcome. While evidence of irregularities exists, that evidence does not meet the legal standard required to deprive those voters of the outcome they chose.

Since at least 1848, it has been the law in New Hampshire that a result declared by the moderator is presumed correct, and is overturned only if evidence of irregularities proves that the result was affected. "The presumption is that the report [of the officials conducting the count] was right. This presumption must be overcome by evidence, and the evidence is not sufficiently strong for that purpose." *Kimball v. Lamprey*, 19 N.H. 215 (1848).

Scholarly research in 1975 concluded that "[n]o cases have been found in which a tribunal has ordered [invalidation of a vote] solely to remedy popular perceptions of the unfairness of an election." 88 Hav. L. Rev. 1298, 1331 (1975). Research of more recent case law has also disclosed no circumstance where a court has found a general perception among the public that the declared results of a vote are not reliable as sufficient grounds for invalidating those results.

As recently as 2003, our Supreme Court reaffirmed that New Hampshire courts "will not void an election because of mere irregularities or technicalities in the form of a ballot, election or vote . . . ." *Appeal of McDonough*, 149 N.H. 105,112 (2003). We have a duty to apply this established New Hampshire law.

This legal standard exists in the context of a system of government that in certain circumstances preserves the right of voters to require another vote. "A special meeting shall be held within 30 days following the receipt by the school board of a petition calling for such a meeting and setting forth the subject matter upon which action is desired signed by at least 5 percent of the voters who are duly registered on the checklists of the district on the date the petition is submitted." RSA 195:13. Voters interested in pursuing this option should be aware that the Legislature has imposed a constraint on the action taken at such special meetings. "No such action taken at any special meeting shall be valid unless a majority of all the legal voters are present and vote at such special meeting, unless the governing board of any municipality shall petition the superior court for permission to hold an emergency special meeting, which if granted, shall give said special meeting the same authority as an annual meeting." RSA 33:8. *See also* RSA 31:5. This parallel provision in the chapter describing the powers and duties of towns explicitly defines emergency. It provides that "[n]o . . . appropriation previously made [may] be reduced or rescinded at any special town meeting except by vote by ballot, nor unless the ballots cast at such meeting shall be equal in number to at least ½ of the number of legal voters borne on the checklist of the town entitled to vote at the annual meeting or biennial election next preceding such special meeting . . . ." RSA 31:5. Actions by the District that give third parties rights to the expenditure of appropriated funds may limit the ability of the District to rescind the decision to approve issuance of bonds. "[The Supreme Court] has stated that, ordinarily, where no rights of third parties have attached, a municipal corporation has the power to reconsider or rescind any action previously taken." *Nash Family Investment Properties v. Hudson*, 139 N.H. 595, 603 (1995) (internal quotations omitted) (quoting *Frost v. Hoar*, 85 N.H. 442, 443 (1932)).

In conclusion, the law provides that the will of the voters as declared by the moderator at the conclusion of a meeting vote is presumed valid. A court may invalidate a meeting vote based on irregularities only if evidence establishes that it is more likely than not that the irregularities in the conduct of the vote are of such a nature as to affect the result.[1] Even if all questionable votes are removed from the vote total for "yes" votes, the available evidence indicates that two-thirds or more of the District voters who voted on Article 4 favored its adoption. The statutes applicable to this matter and a detailed legal analysis, including citations to case law, for each area of possible irregularity follows.

---

[1] *Kimball v. Lamprey*, 19 N.H. 215 (1848)(count by tellers presumed correct and resulting decision to adjourn upheld where evidence did not prove count was wrong); *Judkins v. Hill*, 50 N.H. 140 (1870) (election vote upheld where unexplained discrepancy existed between vote total and total number of voters marked on the checklist); *Attorney General v. Folsom*, 69 N.H. 556, 558 (1899)(election result voided and office awarded to challenger where evidence showed illegal vote created a tie that lead to different outcome); *New London v. Davis*, 73 N.H. 72, 76 (1904)("votes passed at town-meetings should be liberally construed. If they fall within the authorized powers of the town, ingenious distinctions . . . will not be unnecessarily resorted to, when the effect would be to defeat the apparent intention of the voters"); *Leonard v. School Dist. of Cornish*, 98 N.H. 296 (1953) (declared result, a vote approving construction of a new school, upheld where evidence did not show that irregularities affected the outcome); *Mace v. Salomon*, 99 N.H. 370 (1955)(evidence of irregularities in session for correction of the checklist used at a meeting did not invalidate meeting vote); *Lamb v. Danville School Board*, 102 N.H. 569 (1960) (rulings by moderator that did not follow parliamentary procedure did not invalidate meeting vote); *Sugar Hill Improvement*

Statutes

The pertinent text of each statute is quoted, followed by a citation to the section of the Revised Statutes Annotated ("RSA") where the statute is located.

Except as otherwise specifically provided by law, the issue of bonds or notes. by any municipal corporation, except a city or a town which has adopted a charter pursuant to RSA 49-B, without a budgetary town meeting, and except a school district or municipality which has adopted official ballot voting procedures pursuant to RSA 40;13, **shall be authorized by a vote by ballot of 2/3**, and the issue of tax anticipation notes, by a vote of a majority, of all the voters present and voting at an annual or special meeting of such corporation, called for the purpose.

RSA 33:8 (emphasis added).

All articles appearing in the warrant which propose a bond or note issue exceeding $100,000 shall appear in consecutive numerical order and shall be acted upon prior to other business except the election of officers and zoning matters or as otherwise determined by the voters at the meeting. Polls shall remain open and ballots shall be accepted **by the moderator** on each such article, for a period of not less than one hour following the completion of discussion on each respective article. **A separate ballot box** shall be provided for each bond article to be voted upon pursuant to this section.

Assoc. v. Lisbon, 104 N.H. 40 (1962) ("The burden was on the plaintiffs to show such fraud or irregularities in the proceedings, including improper preparation or use of the check list, as left the intent of the voters in doubt or affected the result of the special meeting."); *City of Keene v. Gerry's Cash Market, Inc.*, 113 N.H. 165, 166 (1973) ("Absent fraud or irregularities which influence the outcome of a meeting, action taken at meetings of towns and school districts has consistently been upheld despite technical departures from rules of procedure."); *Byron V. Timberlane School Dist.*, 113 N.H. 449, 456 (1973); ("There being no proof of fraud or of irregularities on the part of the election officials of such a nature as to affect the result of the vote . . . we hold that vote legal and valid."); *Derry v. Adams*, 121 N.H. 473, 479 (1981) ("We are mindful that in resolving election difficulties care must be taken that the matter is not decided on the basis of unwarranted technicalities. The goal must be the ascertainment of the legally expressed choice of the voters."); *Appeal of Soucy*, 139 N.H. 110 (1994) ("[T]he law in New Hampshire provides that in the absence of fraud, irregularities will not render an election invalid unless they affect the result of the election."); *Appeal of McDonough*, 149 N.H. 105,114 (2003) ("To set aside an election, a party "must prove either fraud which leaves the intent of the voters in doubt or irregularities in the conduct of the election of such a nature as to affect the result.").

RSA 33:8-a, II (emphasis added).

> Tie votes and recounts in school district **elections** shall be
> handled in the same manner as in town elections as provided in
> RSA 40:4-c and 40:4-d and in RSA 669:30-669:36, except as
> specified herein . . . .

RSA 671:32 (emphasis added).

> I. No article included in a warrant for a town meeting may be
> considered by placing a question on the official ballot used for
> election of town officers unless use of the official ballot for that
> article or type of article is specifically authorized or required by
> law.
> II. For purposes of this section and RSA 40:4-e:
> (a) Any law which requires a ballot vote on an article, and
> which uses the term "official ballot", shall be deemed to require
> the use of the official ballot for voting on that article, in towns
> which use the official ballot for the election of officers.
> (b) Any law which prescribes the wording of a question,
> but where the term "official ballot" is not used, shall be deemed to
> authorize, but not require, the use of the official ballot for that
> question, unless a contrary intent is specified. If the official ballot
> is not used for voting on such a question, the prescribed wording
> shall be placed in the warrant, and may also be placed upon a
> preprinted ballot to be acted upon in open meeting in the same
> manner as a secret "yes-no" ballot under RA 40:4-a.
> III. This section shall not prohibit the use of secret written
> ballots at any town meeting pursuant to RSA 40:4-a or 4-b.
> **IV. Articles concerning the issuance of bonds or notes <u>shall
> not be placed on the official ballot</u>, unless the municipality has
> adopted a charter provision authorizing that votes on the
> issuance of bonds or notes shall be placed on the official ballot
> or unless the municipality has adopted the provisions of RSA
> 40:12-14.**
> . . .

RSA 39:3-d (emphasis added).

> At any meeting of a town with a population of more than 500, 5
> voters may make a request in writing prior to a vote by voice
> vote or division vote that the vote be taken by secret written

ballot. Upon receiving such a request, the moderator shall conduct the vote by secret "yes-no" ballot.

(b) Notwithstanding any other provision of law, **on the request of 5 voters, the moderator shall conduct a recount on any vote taken by secret written ballot under subparagraph (a). The recount shall take place immediately following public announcement of the vote taken providing that the vote margin is not more than 10 percent of the total vote cast. There shall be no fee required for a recount under this section.**

II. At any meeting of a town of a population 500 or less, 3 voters may request secret balloting or recounting as provided in paragraph I.

RSA 40:4-a, I. (a) (Emphasis added).

When any vote, **other than by ballot,** declared by the moderator or other officer presiding shall, immediately and before any other business is begun, be questioned in writing or orally by 7 or more of the voters present, the moderator or other officer presiding shall retake the vote by secret "yes-no" ballot.

RSA 40:4-b (emphasis added).

I. If any 10 voters of a town shall, before the expiration of 7 days from the date of an annual meeting or special meeting, apply in writing to the town clerk for a recount of the ballots given in at said meeting on any question, affecting said town only, **legally appearing on the official Australian[2] or nonpartisan ballot** used **at said meeting,** said clerk shall

---

[2] The term Australian ballot refers to the adoption in New Hampshire of a system of voting that initially developed in Australia. Prior to the adoption of the Australian ballot, voters either wrote the names of the candidates they wanted to vote for on a piece of paper or the voters brought to the polling place a pre-printed ballot. These ballots were prepared by and distributed by political parties or candidates and were often printed with distinctive colors or markings so that a campaign worker could watch the voter and see whom he voted for by observing the character of the ballot he deposited in the ballot box. This made it practical to bribe voters with money or alcohol. Samuel Issacharoff, Pamela S. Karlan and Richard H. Pildes, The Law of Democracy, 348-350 (2nd ed 2002). [T]he Australian ballot included four essential protections: 1) the ballots were printed and distributed at public expense; 2) they contained the names of all the candidates duly nominated by law, either by party convention or petition of voters . . . ; 3) they were distributed only by election officers at the polling place ("exclusive" or "official ballot"); and 4) there were detailed provisions for [voting booths] to ensure secrecy in casting the vote." John C. Fortier and Norman J. Ornstein, The Absentee Ballot and the Secret Ballot: Challenges for Election Reform 36 U. Mich. J. L. Reform 483, 488 (2003). "The term 'Australian ballot' is now used interchangeably with 'secret ballot.'" Id. An Australian ballot can be partisan or non-partisan. A "yes-no" ballot, while sharing some characteristics of an Australian ballot, is not an Australian ballot.

appoint a time and place for the recount not earlier than 5 days nor later than 10 days after the receipt of said application. The applicants for such recount shall pay to the town clerk, for the use of the town, a fee of $10.

II. The recount shall be held at the time and place appointed, and the ballots shall be recounted by the board of recount in accordance with the procedures for recounts of town elections under RSA 669:30-33.

RSA 40:4-c (emphasis added).

If, in the case of a recount of votes, it shall appear that the result of the vote on the question was other than as declared by the moderator, the board of recount shall declare the result found by it and shall, after 5 days from such declaration, if no appeal is taken to the superior court, certify such declaration to the town clerk and said declaration shall be final, unless the result is changed upon appeal to the superior court.

RSA 40:4-d

No question submitted to voters at a town meeting or election pursuant to RSA 39:3-d shall be submitted by use of a question printed on the official ballot unless that form of submission is specifically authorized or required by law.

RSA 40:4-e.

Authority of the Moderator

The moderator shall have the like power and duty as a moderator of a town meeting to conduct the business and to preserve order, and in the conduct of a school district meeting, all the statutory duties, powers and authority granted to town moderators, and may administer oaths to district officers and in the district business.

RSA 197:19.

Calculation of a 2/3 Vote

Where a two-thirds vote is required, all that is necessary for passage is the attainment of at least two-thirds of

those present and voting. Thus, if there are 150 present and voting, . . . a count of 100 aye and 50 nay meets the requirement for a two-thirds vote. If the number voting is not divisible by 3, and the number of votes required to achieve a two-thirds vote is thus not a whole number, required number is rounded up to the next largest whole number. Thus, if 100 are present 67 votes are required to achieve a two-thirds vote.

Richard B. Johnson, Benjamin A. Trustman, and Charles Y. Wadsworth, Town Meeting Time: A Handbook of Parliamentary Law, §67 at page 149 (3rd Ed. 2001).

A two-thirds vote – when the term is unqualified—means at least two thirds of the votes cast by persons legally entitled to vote, excluding blanks or abstentions, at a regular or properly called meeting at which a quorum is present. For example, at such a meeting. . . :
- If 30 votes are cast, a two-thirds vote is 20.
- If 31 votes are cast, a two-thirds vote is 21.
- If 32 votes are cast, a two-thirds vote is 22.
- If 33 votes are cast, a two-thirds vote is 22.

Roberts Rules of Order (10th ed., 2000), p 388.[3]

In determining whether a vote has satisfied the 2/3-vote requirement, the denominator of the 2/3rds fraction is the total number of "yes" votes plus the total number of "no" votes. Blank ballots and ballots with overvotes (voted both "yes" and "no") should not be counted as part of the total votes cast.

To determine the number of votes required for a 2/3 vote to pass:

- Step 1. Add the total number of "yes" votes to the total number of "no" votes. This total equals the total number of votes. In the 2/3rds fraction, this is the denominator (the bottom number).

- Step 2. The total number of "yes" and "no" votes combined should be divided by 3. The result, the quotient, will be a number that equals one-third of the total votes.

- Step 3. The quotient should be multiplied by 2.

---

[3] Moderators determine the rules of meetings. Adoption of Robert's Rules of Order or other similar highly complex rules is discouraged. Robert's Rules are cited here as no superior authority has been found.

- Step 4. If the resultant product is a whole number, that is the number of votes required for a question requiring a 2/3 vote to pass. If the resultant product is not a whole number go to Step 5.

- Step 5. If the resultant product is not a whole number, the result must be rounded up to the next whole number. That whole number is the number of votes required to pass.

The following is an example applying this process. Assume 20 "yes" votes and 10 "no" votes were cast. Step 1, 20 + 10 = 30. Step 2, 30/3 = 10. Step 3, 10 * 2 = 20. Step 4, 20 is a whole number so the calculation is done. Therefore, because there are 20 "yes" votes for a question on which a total of 30 votes were cast, the question passes.

Now assume 21 "yes" votes and 10 "no" votes. Step 1, 21 + 10 = 31. Step 2, 31/3 = 10.333333... Step 3, 10.33333.... * 2 = 20.6666666... Step 4, 20.6666666... is not a whole number, so go to step 5. Step 5, 20.666 rounded up is 21. Therefore, because there are 21 "yes" votes for a question on which a total of 31 votes were cast, the question passes.

The reason the number is rounded up in Step 5 is that 20 votes do not equal or exceed 20.66666... votes, therefore 20 "yes" votes do not constitute a vote of 2/3. 21 votes is greater than 20.66666, therefore if 31 people vote on a question requiring a 2/3 vote and 21 vote "yes", the question passes. But if only 20 people vote "yes," the question fails.

An equivalent result can be obtained by multiplying the total number of votes (the number obtained at Step 1, by .6666667. Calculators vary slightly in the manner in which they round and it is our recommendation that if a calculator is used, use the greatest number of decimals in the calculation, as the calculator will allow.

It is the view of both the Attorney General's Office and the Secretary of State that this rule of rounding up applies even where the decimal is very small. For example, if the product of the calculation at Step 3 is 451.0135, then 452 votes would be required for a question requiring a 2/3 vote to pass. Similarly, were a 3/5 (60%) vote required and if the total number of "yes" votes equaled 59.99% of the total number of "yes" and "no" votes, a question requiring a 3/5 vote would fail.

It has been suggested that a question requiring a 2/3 vote passes if the number of "yes" votes is greater than the product of the number of "no" votes times 2. This is mathematically correct, because if the number of "yes" votes is greater than 2 times the number of "no" votes it is necessarily the case that at least 2/3 of the total number of "yes" and "no" votes are "yes" votes.

The product of two times the number of "no" votes, however, is not the number of votes required to for a 2/3 vote question to pass. Consider the example where 1000 "yes" and "no" votes are received on a question requiring a 2/3 vote and 10 of those votes were "no" votes. 10 * 2 = 20. Provided the number of "yes" votes, in this hypothetical 990, is greater than 20 the question passes. 20, however, is not 2/3 of 1000. 666.6667 is 2/3 of 1000, therefore 667 "yes" votes are necessary for a 2/3 vote question to pass. While the short cut of concluding that a 2/3 vote has passed if the number of "yes" votes is greater than the number of "no" votes times two, is valid, it does not inform the voters of the margin of victory.

Margin of Victory

Some District voters who have communicated with this Office have argued that even if the 52 vote discrepancy is deducted from the number of "yes" votes, Article 4 passed with a margin of victory of three votes. The term "margin of victory" is generally understood to be the number of votes received beyond the number of votes necessary for a candidate to win or a question to be adopted. The District's Moderator announced a result of 1503 "yes" votes to 724 "no." This result indicated that there were a total of 2227 votes. Two thirds of 2227 is 1484.6667 or 1485 votes. Therefore, the margin of victory is 18 votes. If the 52 vote discrepancy is removed, two-thirds is 1450 votes. Therefore, the margin of victory, as defined above, is 1 vote.

Some District voters and the moderator have suggested that a larger margin may exist. If the margin of victory were re-defined as the number of favorable votes that could be removed before the outcome changes, the margin is larger where a question is determined by a two-thirds vote. If three fewer District voters cast a "yes" vote, that is they did not vote at all, the outcome would not change. The Moderator declared that there were 1503 "yes" votes. Deduct the 52 vote discrepancy. There then would be 1451 "yes" votes. Now assume three people who voted "yes" did not vote at all, there would be 1448 "yes" votes and 724 "no" votes. There would be a total of 2172 votes. Two-thirds of 2172 is 1448. Therefore, even if three voters who voted "yes" had not voted at all, Article 4 would have passed. If "margin of victory" is defined in this manner, the margin of victory for Article 4 if the 52 vote discrepancy is deducted from the "yes" votes is 3 votes. If 4 people who voted "yes" did not vote at all there would be 1447 "yes" votes, 724 "no" votes, and a total of 2171 votes. Two-thirds of 2171 is 1447.3334, which must be rounded to 1448. Because 1447 is less than 1448, in this scenario Article 4 would have failed. The analysis would change if instead of having fewer voters, voters who voted "yes" instead voted "no."

The margin of victory is often relied on by candidates and voters to determine whether a recount should be called for. We recognize that many voters may believe that if a margin of victory of 1 extra vote had been announced by the District's Moderator on meeting night, a recount would have been called for. We find no legal authority, however, suggesting that this lost opportunity would be sufficient cause for a court to invalidate the vote.

Irregularities

Discrepancy between total votes counted and total voters checked off on the checklist.

We conclude that the ballot count results announced by the Moderator reflect 52 more votes than the number of voters checked off on the checklist as having voted on Article 4. The Supreme Court has addressed a similar circumstance. The case of *Judkins v. Hill*, 50 N.H. 140 (1870), dealt with an election where 546 ballots were counted, however, only 519 names were checked off on the checklist, a discrepancy of 27 votes. In that case the Court notes that there was "no proof except what comes from the fact that more votes were declared than were checked on the list." *Id.* at 140-41.

> There may . . . have been some double voting, and there may have been some mistake in the counting: to some of these causes, or to all combined, the discrepancy may be due. If it was due to either of the two first causes, it would not in the absence of fraud in the conductors of the election affect the entire vote. If illegal votes were received, but not enough to change the majority, it would not invalidate the election.

Id. As is discussed further below, this Office has not found evidence that clearly establishes what caused the discrepancy. The Supreme Court, however, has determined that this type of uncertainty is not enough to invalidate the declared result of a vote.

Miscount

Interviews with the Moderator, Assistant Moderator, and all of the counters whom we were able to identify reveal that the Moderator used the following counting process. The ballots from the three different voting opportunities (Wednesday night voting by District voters following discussion of Article 4, Thursday votes cast in Brookline, and Thursday votes cast in Hollis) were combined on one table. The counters separated the ballots into piles of "yes" and "no" votes. Counters then counted the ballots into a pile of 25 "yes" votes or 25 "no" votes. The counters examined each ballot during this process to ensure it was a "yes" ballot if being counted into a pile of "yes" votes or a "no" ballot if being counted into a pile of "no" votes. After counting out a pile the person set the pile aside. A different person then recounted the pile to double-check the count. The person doing the double check counted the ballots in a manner that allowed them to verify that all the ballots were "yes" ballots or "no" ballots. The counters we interviewed reported that they discovered a few errors during the verification count. Each stated that when he or she discovered an error, for example if a pile contained 24 instead of 25 ballots, he or she corrected the error. Someone

else then counted that pile a third time to ensure the count was accurate. After counting and verifying, the counters passed the pile to a second table.

The Moderator and Assistant Moderator worked at the second table. They sorted the piles, separating the "yes" piles from the "no" piles. They placed a paper clip on each pile. The Moderator then stacked 4 clipped piles of 25, thereby creating stacks of 100 votes each. When the process of stacking ballots into groups of 100 was done, the Moderator determined the total votes by counting the stacks aloud. Some, but not all, of the counters observed this process. The Moderator intended that the counters observing his counting of the stacks would serve to verify that he was making that count accurately. The Moderator reports that there were 15 stacks, believed to have 100 votes in each stack, plus 3 "yes" votes. He reports that there were 7 stacks, believed to have 100 votes in each stack, plus 24 "no" votes.

Each of the counters with whom we spoke were very confident that the counting of ballots into piles of 25 was done in a manner that was highly accurate. The Moderator's use of different people to count and then recount or verify each count is consistent with our understanding of best practices. It is unlikely that if a counting error caused the 52-vote discrepancy that the error occurred during this phase of the counting.

The final step of the process relied on the Moderator, and those counters who monitored the Moderator, to ensure its accuracy. While the final counting step had the safeguard of being aloud with several people watching the process, it did not involve any other system of double checking or recounting.

Some of the election officials involved now believe that one source of the discrepancy may have been the inadvertent counting two stacks of only 3 piles of 25 "yes" votes, which therefore actually contained only 75 votes instead of 100. This Office received a sample of the ballot type used. While the actual ballots cast in this election were destroyed, a mock-up of ballots clipped into piles of 25 was created. Based on our examination of this mock-up of the final step of ballot counting, it is our opinion that stacks of 75 ballots could be mistaken for stacks of 100 ballots. We found no evidence, however, that clearly establishes that the discrepancy is due to a miscount resulting from counting stacks that actually contained only 75 ballots, as containing 100 ballots.

Even if there were evidence that clearly established that a miscount was the cause of the discrepancy, a proven miscount would not be grounds to invalidate the declared results. "[I]f the discrepancy was due to a mistake in counting, it would not in the absence of fraud vitiate the election if the mistake did not change the majority." *Judkins v. Hill*, 50 N.H. 140 (1870).

"The moderator [of a cooperative school district] shall have the like power and duty as a moderator of a town meeting . . ." RSA 197:19. "The moderator shall preside in the town meeting, regulate the business thereof, decide questions of order, and make a public

declaration of every vote passed, and may prescribe rules of proceeding; but such rules may be altered by the town." RSA 40:4. No other statutes addresses the manner or method of counting to be employed by moderators.

The statutory provisions for elections authorize the moderator to use the assistance of legal voters, but do not define a particular counting method. "After the close of the polls, . . . the moderator of the school district, . . . shall then proceed to count the ballots publicly with the assistance of such legal voters of the district as the moderator of the school district shall appoint." RSA 671:21 (addressing official ballots cast at an election). The Secretary of State's Election Procedures Manual, issued pursuant to RSA 652:22, provides additional guidance in a section that addresses the counting of ballots at elections, but which is applicable to counting "yes-no" ballots:

> The moderator shall oversee the count of votes . . . and may discharge any other duties relating to the counting of votes. The moderator sets up the voting area for the counting process. Each moderator should devise a system for counting ballots which will expedite the process. RSA 659:60. . . . The moderator may select volunteers to assist election officers in counting ballots. These volunteers must be voters in the town or ward or 17-year-olds who would be qualified as a voter were they 18-year-olds. . . . Swear in these non-election volunteers as election officials (inspectors of election pro tempore). As election officials the volunteer ballot counters are swearing or affirming that they will perform their duties lawfully and they become subject to criminal prosecution for official misconduct pursuant to RSA 666:3.

> Errors occasionally occur during the calculation of vote totals. Sometimes errors are made when votes from different counting tables are added together or when totals of hand counted ballots are added to totals of machine counted ballots. Counting is often completed by election officers who have been on duty for 10-12 hours prior to the start of counting. Adding checks and balances to the counting process will require additional time and/or personnel, but it will be easier and cheaper than conducting a recount. The legitimacy of the election process and the public trust in elections is negatively affected when recounts reveal counting or totaling errors. Moderators are encouraged to consider using one or more techniques for avoiding counting and tabulation errors which are currently used in various towns and cities. See model instructions for tabulating results starting at page 104.

William M. Gardner, Secretary of State, Election Procedures Manual 2004-2005, at 40-41. We conclude that the Moderator adopted a counting procedure that included initial steps that contained appropriate levels of double-checking or verification. However, the final step did not benefit from a robust system for double-checking. As the law does not specify any particular method or manner of counting, the method adopted does not violate the law.

Comparison of Vote Total With Checklist Total

The irregularities found in this election were discovered by comparing the number of voters whose names are checked off on the checklists against the total number of declared votes. The Moderator reports that, prior to declaring the result of the vote on Article 4, he did not compare the total number of persons checked off on the checklist to the total number of votes. New Hampshire law does not require a moderator to make such a check, however, it is a recommended practice.

At an election, New Hampshire law requires that there be two checklists, a check-in checklist (RSA 659:13) and a check-out checklist (RSA 659:23). Districts that use ballot counting machines are not required to have a check-out list. RSA 659:23, II. When a ballot counting machine is used, the machine report includes a report of the total number of ballots counted.

One purpose of having both a check-in list and a check-out list is to make the two lists available for comparison with the total number of ballots cast. The check-in list also serves the purpose of controlling who receives ballots. If the only purpose for checklists were to control who receives ballots, a check-out list would not be necessary. The Legislature has declared that where a voting machine is used, no check-out list is required. The only common function served by both a check-out list and a ballot counting machine is that each produces evidence of the total number of people voting. By requiring one or the other, it is our view that the Legislature implicitly intends that the evidence from either source of the total number of voters voting be used by moderators in determining the accuracy of their count of ballots. The Election Procedure Manual provides two model ballot counting systems. Each recommends checking the vote total against the total number of voters checked on the checklist as voting.

> (Optional whether done election night or later) Have the supervisors count the number of registered voters (including those who registered on election day) who are checked off as having voted on the checklist.

> The moderator should stop before announcing the results and check the final tallies. If a count was done of the total number

of persons checked off as having voted on the checklist the
tallies for each office and question should be verified against
that count. In towns or wards with 1000s of ballots and 1000s
of voters checked off on the checklist the moderator should be
looking for any significant discrepancies between the totals. It
is difficult to get a perfect count from the checklist, therefore, it
is not essential that the total count for each office or question
exactly match the vote totals. . . . If any discrepancies are found
the moderator should investigate and attempt to resolve the
discrepancy before declaring the results.

Election Procedures Manual 2004-2005, at 104-106.

It is our understanding that current practice regarding comparing the total persons
checked off on the checklist against the total votes counted varies throughout the State. The
election law statutes do not explicitly require such practice. For the reasons set forth above,
we believe the Legislature required two checklists or one check list and a ballot counting
machine that produces a total of the number of ballots counted at elections so that the
checklist total(s), the ballot counting machine totals, and the total number of votes cast can
be compared. At an election, we believe that a comparison should be made.

There is, however, no requirement for a second checklist or a ballot counting machine
at a meeting. We, nonetheless, strongly recommend that moderators compare the total
number of ballot votes to the total number of persons checked off on the checklist as having
voted on the question before declaring a result. As the Election Procedure Manual
recognizes, it is reasonably likely that the totals will not match perfectly at every vote. A
significant mismatch like the one found in this case, however, will signal a moderator to take
further steps to ensure the accuracy of the vote count. Provided the margin of victory is
larger than any small discrepancy found between the total votes and the total from the
checklist, it is proper to declare the result.

We conclude that because a comparison of the total votes counted to the total number
of voters checked off on the checklists as having voted is not required by law, the Moderator
did not violate the law by electing not to make this comparison.

Monitoring the Ballot Box

Statements from several voters indicate that, on Wednesday March 3rd, 2004, neither
the Moderator nor a designee was present at the ballot box when the polls were opened for
voting on Article 4. The Moderator reports that a police officer was detailed to stand near
the box. Several voters who were interviewed report that the officer was positioned
sufficiently far enough away from the ballot box that it would have been difficult for him to

detect a voter who dropped multiple ballots into the box. It is our understanding that the officer's role was security and that he was not designated as an election official nor assigned to instruct voters.

New Hampshire law requires that when voting on a bond article of over $100,000 the "[p]olls shall remain open and ballots shall be accepted **by the moderator** on each such article, for a period of not less than one hour following the completion of discussion on each respective article." RSA 33:8-a, II (emphasis added). The phrase "shall be accepted by the moderator" is properly construed literally. One responsibility of the moderator is to ensure that each voter casts only the appropriate number of ballots; such as in a "yes-no" vote, only one ballot.

The statutes describing the procedure for voting at elections is explicit. "The voter shall then present his ballot with the official endorsement uppermost to the moderator who shall then deposit the ballot in the ballot box." RSA 659:23. This requirement is waived for towns that use a ballot counting machine, in part, because the machine is designed to accept only one ballot at a time. RSA 659:24.

> The voter then must hand his ballot to the moderator who must place the ballot in the ballot box himself or herself. The purpose of this statute is to provide another check that the voter is depositing only one ballot in the box. Reluctant voters should be counseled that the law clearly dictates this procedure. RSA 659:23.

Election Procedures Manual 2004-2005, at 21. The size and character of "yes-no" ballots are such that it would be easier for a voter to unlawfully "stuff the ballot box," than would be the case where full size official ballots are used. The "yes-no" ballots are small enough that a voter could easily hold several in his/her palm and drop several into the ballot box at one time. Best practice is for the moderator to have voters hand the ballot to the moderator or his or her designee. The moderator should ensure that no more than one ballot is present and then drop it into the ballot box. If necessary to preserve the secrecy of the vote, the moderator should instruct voters to fold the ballot in half before handing it to the moderator.

It is important to note that there is no evidence that votes were unlawfully cast in this manner. The Moderator had the ballot clerks/supervisors of the checklist use ballots of a different color on Thursday compared to those used Wednesday night. The Moderator took this action purposely to deter fraudulent voting. We found no evidence that the color of "yes-no" ballot used on Wednesday night was known in advance.

The Moderator has speculated that voters with the unlawful purpose of increasing the total votes, thereby increasing the number of "yes" votes necessary to achieve a 2/3 vote, put more than one ballot into the ballot box. We found no evidence of purposeful wrongful

voting. We have not, however, been able to rule out the possibility that voters out of a misunderstanding of the proper voting procedure or with wrongful intent deposited more than one ballot into the ballot box.

Two individuals who counted ballots reported that they handled ballots that consisted of the entire "yes-no" ballot, that is both the "yes" and "no" sides were still connected. The counters report the voters marked their votes with a circle around "yes" or "no" or with an X near the "yes" or "no." No one documented the specific number of ballots marked in such a manner. The Moderator reported that no one reported the existence of such ballots to him. No evidence exists of blanks, that is ballots with both sides still attached and no vote on them. The presence of ballots with both sides attached, however, is evidence that the process of monitoring what voters put into the ballot box was inadequate.

Moderators have a duty to oversee the work of the individuals doing the counting. Best practice is for the moderator to have no duties other than overseeing the counting, while the counting is going on. Moderators should instruct counters to bring any unusual ballots to the moderator's attention. While the evidence indicates the counters handled these ballots in the proper fashion, they should have been instructed to inform the Moderator and the Moderator should have participated in determining how the ballots are counted.

The Supreme Court has addressed the irregularity of a moderator failing to monitor the ballot box. The case of *Leonard v. School Dist. of Cornish*, 98 N.H. 296 (1953) addresses a vote at a school district meeting to build and equip a new school.

> The following are the principal irregularities relied on [as] grounds for [invalidating the vote]. . . . The moderator . . . refused to challenge any voter or to allow anyone else to do so, and that after he had been warned that illegal voting was going on, he did not put to a vote a motion that the checklist be used in voting and he did not allow its use. It is further alleged that **he failed to stand guard over the ballot box and did not delegate anyone to do so in his stead**, and that he did not preserve the ballots allowing them to be mingled with others after the count but before the announcement of the result.

Id. at 297 (emphasis added). In that case, the court, citing *Judkins,* held that in "order to be entitled to the relief sought the petitioners had the burden of proving fraud which leaves the intent of the voters in doubt or irregularities in the conduct of the meeting of such a nature as to affect the result." *Id.* The Court upheld the declared result, a decision to build a new school, because "the evidence does not compel the conclusion that a different result would have been reached if these irregularities had not occurred." *Id.* at 298 (citing *Hill v Goodwin*, 56 N.H. 441, 454 (1876).

Therefore, while we conclude that it was contrary to law for the Moderator to fail to personally or through a designee receive each vote cast on Article 4, that failure would not be found sufficient by a court to justify invalidation of the declared outcome.

Two Ballot Boxes

Most, but not all, voters interviewed recall two boxes being in use on Wednesday night. "**A separate ballot box** shall be provided for each bond article to be voted upon pursuant to this section." RSA 33:8-a, II (emphasis added). While the requirement of a separate ballot box is meant to ensure that ballots for separate bond articles are not commingled into one box, its language should also be understood to prevent the use of two boxes at one polling place for one vote. Moderators should organize voting to avoid unnecessary confusion. Several of the voters interviewed found the presence of two boxes confusing, particularly when the Moderator was not near the boxes to explain which to use to cast their ballots. No voter has been interviewed who put his/her vote in one and discarded the unused side of the ballot in the other ballot box, but several speculated that others may have done so. We conclude that the use of two ballot boxes during the voting Wednesday night is an irregularity. Had a moderator been actively receiving each ballot or directly observing and instructing each voter, this irregularity would have posed little risk to the legitimacy of the vote. We found no evidence that any part of the discrepancy of 52 votes is attributable to any voter putting ballot sections in each box, in effect casting two ballots.

Unused Ballot Discard Procedure

Many voters interviewed report that it is the local custom to place a container near the ballot box and that voters casting "yes-no" type ballots are instructed to discard the unused portion of the ballot (the "no" section for those voting "yes," the "yes" section for those voting "no") in that container. Voters reported that at the beginning of the voting process no container was in place and no one was instructing voters what to do with the unused side of the "yes-no" ballot. The law does not explicitly require that a container be present for voters to use to discard the unused side of their "yes-no" ballot. To the extent that a container was not present at the start of voting, this would not constitute an election law violation. Best practice, however, is to have clear instructions for how to vote and a mechanism for disposing of the unused portion of the ballot.

Voting Instructions

It is standard practice for a moderator calling a vote on a question to restate the question to those in attendance, to clearly state the procedure for voting, and where a "yes-no" ballot is used to clearly state the effect of casting a "yes" vote and the effect of casting a "no" vote. We reviewed a videotape of the March 3, 2004, meeting produced by the local cable access company. No instruction to voters for Article 4 was recorded on the video in the period immediately before the opening of the polls for voting on that Article. It is

undetermined if this was done off camera or after the recording was stopped. Voters who were interviewed reported that the District's Moderator in the past consistently made such a statement before each ballot vote, however, none of the voters could recall whether or not such a statement was made immediately prior to the polls opening for Article 4 on Wednesday night. If the Moderator did not give instructions to voters, this would be an irregularity. However, no one who has communicated with this Office stated that he or she had any doubt about the effect of casting a "yes" versus a "no" vote. Several speculated, however, that other voters may have been confused the lack of instructions.

<u>Second Day Voting</u>

A few voters interviewed reported that there was insufficient information provided to those voting on Thursday during the day, both on what was being voted on and regarding how to vote. The Moderators who managed voting during the day on Thursday reported that they instructed each voter as necessary. The Assistant Moderator reported that in Hollis a sign was posted along the path into the voting place stating the Article that was being voted on. Voting on bond issues using "yes-no" ballots is common.

> [T]owns use a slip of paper which can be ripped in half with yes on one side and no on the other. One side is then put into the ballot box and the other half is thrown away. Any system such as this is legally sufficient; however, **to avoid confusion and challenge**, it is suggested that on any particularly sensitive issue, **it would be helpful to pre-print ballots which read as follows: Are you in favor of Warrant Article #5 appropriating funds for the construction of a new town hall**?
> ____ Yes ____No

16 P. Loughlin, <u>New Hampshire Practice, Municipal Law and Taxation</u> §4.26, at 94 (1993) (emphasis added). We endorse Attorney Loughlin's recommendation as a best practice.

Voters complained that the voting procedure allowing voting to continue during a second day was not adequately warned. Some also complained that having a second day of voting was confusing to voters. Meeting statutes do not explicitly address this issue; however, they afford the voters present at a meeting control of the meeting. RSA 40:4, I. The Supreme Court has recognized the authority of voters at a meeting to adjourn the meeting to a later date. *Byron v. Timberlane Regional School District,* 113 N.H. 449 (1973). In that case, addressing whether voters had adequate notice of the voting occurring at the adjourned sessions the Court held "that the warning and posting which was duly made for the annual meeting of March 31 effectively gave notice to the voters of any business to be transacted in the recessed or adjourned annual meeting until its final adjournment." *Id.* at 456. *Byron* was another case where the Court applied the standard that "there being no proof of fraud or of irregularities on the part of election officials of such a nature as to affect the

result of the vote by which article 2 [for bonding the building of a school] was adopted [at an adjourned meeting] . . ., we hold that vote legal and valid." *Id.*[4] The meeting statutes neither explicitly permit nor prevent interrupted ballot voting at a meeting.

A core principal of ballot voting at elections is that the process is conducted in public, from the display of the empty ballot box just before the polls open to the announcement of the results after all the counting has been completed. *See* RSA 659 generally. Ballots may not be removed from within the rail during voting or until the counting is complete. RSA 659:38. The requirement that the voting and counting occur as one continuous process and that any citizen may observe from beginning to end is an important safeguard against both fraud and irregularities. Provided vigilant citizens are present, no opportunity exists for unlawful ballots to be added to or lawful ballots to be removed from the ballot box. Bond votes often constitute a commitment of tax dollars over decades. We believe it is unlikely that the Legislature intended that ballots for the election of officers whose terms typically last one to three years and decisions on subjects like the adoption of zoning ordinance, that may be amended at any future annual meeting, would receive greater protection than ballots used to authorize bonding that will commit tax funds for twenty or thirty years. Furthermore, a bond vote is one that may not be reversed once a third party gains a right to any of the funds. Interrupted ballot voting of the character used for Article 4 violates this core principle for conducting elections, it is a question for the Legislature to determine if this principle should be applied to ballot votes at meeting.

The Secretary of State's Office, however, reports anecdotal information suggesting that the practice of continuing voting on bond questions to another day has occurred several times throughout the State in the past.

We note that the District's Moderator took appropriate steps to ensure the integrity of the ballots cast on Wednesday night. Evidence from several sources established that the ballots were removed from the ballot box, sealed in a container, transferred to the custody of the Hollis Police Department, stored by the Police Department in secure storage overnight, and then returned to the custody of the Moderator on duty during the day at the Hollis polling place. The Moderator opened the sealed container in view of the public and the counters at the time when the ballots from Thursday's voting were commingled at the start of the counting process.

The Legislature and the Court has recognized that the voters of a district or town at its annual meeting have broad authority to control the meeting. We conclude that current law does not clearly prohibit the practice of interrupting and continuing ballot voting on a

---

[4] The issue in *Byron* was repeated reconsideration of a bond article that failed two times before being adopted by a significantly smaller number of voters in a vote held from midnight until 2 AM. The Legislature has since adopted RSA 33:8-a, IV which requires an interval of at least 7 days and public notice after a successful vote to reconsider and before a bond article can be voted on at a reconvened session of a meeting.

different day. Therefore, we conclude that no irregularity or misconduct exists associated with this occurrence.

Availability of a Recount

Voters complained that they were denied the opportunity to have the ballot vote recounted pursuant to RSA 40:4-c. RSA 40:4-c applies to "any question, affecting said [district] only, legally appearing on the official Australian or nonpartisan ballot used at said meeting . . ." RSA 40-4-c, I. The "yes-no" ballot is not an official Australian or nonpartisan ballot. *See* explanation of Australian ballot at footnote 2.

> There is no statutory or practical method for recounting most of the votes that occur at a town meeting. However, within seven days from the date of the annual or special town meeting, ten voters of the town may apply in writing to the town clerk for recounts in certain instances. They may apply to the town clerk to recount the ballots given at that meeting on questions which affect the town only. The ballots affecting the town only are those "legally appearing on the official Australian or non-partisan ballot used at said meeting." (**In other words, these recounting provisions would not apply to the "yes-no" ballot**).

13 New Hampshire Practice, Local Government Law §247, at 199 (parenthetical in original) (emphasis added). Under the traditional town meeting form of government used by the District, the opportunity for a recount ends once voting has started on the next question. No statute explicitly addresses recounting bond article "yes-no" type ballots. RSA 40:4-a provides for the use of such "yes-no" ballots anytime 5 voters make a request for a secret ballot. In that circumstance, a recount is provided for only immediately following the announcement of the outcome.

> (b) Notwithstanding any other provision of law, on the request of 5 voters, the moderator shall conduct a recount on any vote taken by secret written ballot **under subparagraph (a)**. The recount shall take place immediately following public announcement of the vote taken providing that the vote margin is not more than 10 percent of the total vote cast. There shall be no fee required for a recount under this section.

RSA 40:4-a, I (b) (emphasis added). The language of this section limits its application to a "yes-no" vote taken upon the request of 5 voters pursuant to subparagraph (a). In the absence of any other provision addressing if and how recounts should be conducted on bond "yes-no" votes or on "yes-no" votes taken pursuant to RSA 40:4-b (triggered by 7 or more

voters questioning a moderator's determination of a vote taken by means other than a ballot, *i.e.* voice or standing), we conclude that RSA 40:4-a, I(b) controls. A doctrine of statutory construction is "that statutes *in pari materia* are to be construed together." *National Grange Mutual Ins. Co. v. Smith*, 133 N.H. 279, 281(1990) (statutes that deal with the same subject must be interpreted with reference to each other). It would otherwise be an absurd construction of the statutes that they allow a recount of any question when a "yes-no" ballot is used at the request of 5 voters before a vote, but not when the request is by 7 voters after a voice vote or when a ballot is required by law. "When examining statutory language, we construe the statute as a whole to avoid an absurd result." *Appeal Of Timothy Carnahan*, No. 2002-344, slip op. at 1, (N.H. April 29, 2003).

Analyzing a meeting held under an earlier statute the Supreme Court concluded that it is the commencement of voting on the next question, not mere discussion or preparation to vote, that ends the opportunity to seek a recount of an earlier question.

> It was moved and seconded that the meeting should proceed to [the next] business. The moderator . . . called on the people to bring their ballots. It does not appear that the question on this motion was put by the moderator. Now it is evident that no other business was commenced. There had been only a proposition to commence it, and the moderator called on the people to do so. But the business before the meeting was the balloting, and the balloting was not commenced. No ballot had been cast. . . . [T]here was no balloting to be broken off by examining the former vote.

Kimball v. Lamprey, 19 N.H. 215, ___ (1848). This case suggests that the last opportunity for a recount of a "yes-no" ballot is immediately before balloting or other voting commences on the next article before the meeting.

Therefore, we conclude that the right to a recount ended once the meeting started voting on the next article considered after Article 4. No right to a recount survived the final adjournment or closing of the meeting.

We note that jurisdictions that have adopted either the Senate Bill 2 official ballot form of meeting (RSA 40:13) or the official ballot for budgetary items form of meeting (RSA 49-D:3 II-a) use an official ballot for bond votes. In those circumstances, the right to a recount continues for 7 days following the meeting. We conclude that no irregularity or misconduct occurred where voters were advised days after the meeting that there was at that moment in time no right to a recount of the ballots cast for Article 4.

Destruction of Ballots

Voters have complained that the District's Moderator destroyed the Article 4 ballots. There is no requirement in the statutes that "yes-no" ballots be preserved. RSA 671:30 requires school districts to adhere to the laws applied to town elections set forth in RSA 669:19-669:25. RSA 669:25 requires towns to adhere to the laws applied to State elections set forth in RSA 658 and RSA 659. "All state election ballots remaining in the possession of the town or city clerk may be destroyed at the expiration of 60 days after a state election." RSA 659:100. RSA 659:98 requires that election ballots be delivered by the moderator to the clerk. "Yes-no" ballots used for a vote on a bond issue at a meeting are not "election" ballots. "'School district election' shall mean an election to choose a school district officer." RSA 652:9. The meeting held on March 3rd and 4th was not the occasion when the District chose its officers and the "yes-no" ballots were not ballots used to choose officers, therefore, they were not "election" ballots. It is, however, best practice to voluntarily preserve ballots used for a bond article.

The Supreme Court addressed the destruction of ballots and found that this alone is not a sufficient basis to invalidate a meeting vote. In *Leonard v. Cornish,* cited and discussed above, one of the allegations was that the moderator, in effect, destroyed the ballots before announcing the result by commingling them with ballots from other votes by the meeting. In other circumstances, the Court has held that voting procedures should use the best available count when ballots are destroyed before a recount. When ballots are destroyed prior to a statewide recount "[t]he twin objectives of ascertaining the popular will and avoiding voter disenfranchisement require that the recount proceed with the inclusion of the original certified ballot tallies of any towns whose ballots have been inadvertently destroyed." *Opinion of the Justices*, 116 N.H. 756, 759 (1976).

We conclude that the statutes do not require that "yes-no" ballots used for a bond vote at a traditional town meeting type of annual school district meeting be preserved. Therefore, there was no irregularity or misconduct arising from the Moderator's destruction of the ballots.

Checklist

We interviewed voters and supervisors of the checklist regarding the procedures used when voters were checked off on the checklist and issued ballots. All statements received indicated that on Wednesday night check-in tables, divided into alphabet sections, were established. A supervisor received the voter's name, verified that the individual was a registered voter, and made a mark on the checklist. A ballot clerk working with the supervisor monitored this process and, upon approval of the supervisor, issued the voter a ballot. On Thursday when voting occurred during the day, all reports indicate that there were few rush periods and a uniform and methodical process was followed in checking off the name of each person who received a ballot. It is the consensus of opinion of all people interviewed that, while the possibility exists, it is very unlikely that qualified individuals received a ballot and were not checked off on the checklist. All also agreed that if this

occurred, it is extremely unlikely that it would account for more than a very few of the 52 ballots/voters discrepancies. The evidence, however, does not absolutely rule out the possibility that some portion of the 52 vote discrepancy is attributable to lawfully cast votes by voters whose names were inadvertently not checked off on the checklist. We conclude there was no apparent irregularity with the management of the checklist.
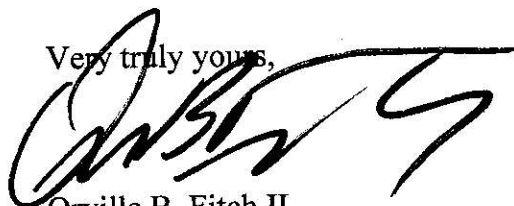
Conclusion

The investigation of the Hollis-Brookline Cooperative School District annual meeting vote on Article 4 concludes that irregularities existed in the conduct of the vote and ballot count. The evidence supports the conclusion that a discrepancy exists between the ballot total and the total number of voters marked as having voted on Article 4 of 52 votes. Because, even if all 52 votes were removed from the totals, Article 4 still passed, albeit by 1 extra vote, we conclude that there is insufficient legal basis for seeking a court order to invalidate the outcome and require a new vote.

A copy of this closure letter is being sent to the chairpersons of the Legislative committees that address the areas of law discussed above. We look forward to working with local election officials, the Secretary of State, and the Legislature, should the Legislature consider amendments to the election or meeting laws that would address the issues set forth above.

The Attorney General's Office will endeavor to distribute this closure letter to all interested parties. We are available to address questions or concerns, to receive new evidence, or to provide further explanation of our conclusions.

Very truly yours,

Orville B. Fitch II
Assistant Attorney General
Civil Bureau
bud.fitch@doj.nh.gov
(603) 271-1238

OBF/jsh

cc: Honorable William M. Gardner, Secretary of State
       Honorable Robert K. Boyce, Chair Senate Internal Affairs Committee
       Honorable Michael D. Whalley, Chair House Election Law Committee
       Honorable Betsey L. Patten, Chair House Municipal and County Government
       Committee

26773.doc